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No. 71-837

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID BRIAN ROPER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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NO.

DAVID BRIAN ROPER,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on March 22, 1971.

Opinion Below

The opinion of the Appellate Court of Illinois is reported in abstract at 272 N.E.2d 667, and the full opinion is reprinted herein as Appendix A, infra.

Jurisdiction

The judgment of the Appellate Court (Appendix B, infra) was entered on March 22, 1971. The time for filing a petition for rehearing was extended to May 5, 1971. A timely petition for rehearing was filed on May 3, 1971. The petition for rehearing was denied on July 12, 1971. A petition to the Supreme Court of Illinois for leave to appeal was timely filed and denied on September 29, 1971. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1257(3).

Questions Presented

1. Whether the petitioner was denied due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States by the holding of the Appellate Court of Illinois that a motion of petitioner's counsel to find the petitioner guilty of voluntary manslaughter foreclosed the petitioner from questioning on appeal the sufficiency of the evidence in support of a verdict finding him guilty of voluntary manslaughter.

2. Whether the petitioner was denied the right to prepare his defense by virtue of the action of the prosecutor in hiding the whereabouts of the investigating officer from the petitioner when the petitioner sought to ascertain from that officer the content of statements given to him by witnesses, and was thereby denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Statement

General Facts

The petitioner, David Brian Roper, was indicted for the crime of murder. The facts from the testimony of both prosecution and defense witnesses tended to show that the

defendant and the deceased both attended a party at the home of a young woman by the name of Laurie Mazurek. There was, as the Appellate Court noted in its opinion, considerable drinking at the party. The defendant and the deceased engaged in a fight on the front lawn after which the defendant went home. Later that night, the defendant returned to the area of the Mazurek home and began letting air out of tires of the cars of the guests at the party. The deceased and another boy by the name of Bruce Drennan ran out of the Mazurek home toward the petitioner. Roper ran from his pursuers until he could not run any further, he stopped and in one motion swung around with a stick which he had found lying nearby, hitting the deceased on the head.

Facts as to first question

The jury found the defendant not guilty of murder and guilty of voluntary manslaughter. On appeal the defendant urged that the facts as above stated could not constitute the crime of voluntary manslaughter. In essence, the defendant argued in the Appellate Court that there was neither the provocation or unreasonable belief as to facts requiring self defense necessary to reduce the crime charged from murder to voluntary manslaughter. In answer to this argument the Appellate Court alluded to the fact that the defendant did not object to the giving of a voluntary manslaughter instruction and to the remarkable fact that the defendant's own attorney urged, by way of motion for directed verdict at the close of the State's case, the trial court to find the defendant *guilty!!!* of voluntary manslaughter. This question first arose as a result of the action of the Appellate Court.

Facts as to second question

Officer Betz was on sick leave from the office of the Sheriff of Cook County. An attempt was made to obtain his home address and serve him with a subpoena. This attempt was unsuccessful and counsel for the defendant moved the Court to order the State's Attorney to divulge the whereabouts of Betz. The State's Attorney refused and offered to stipulate to the accuracy of the report filed by Officer Betz. The trial court was then pressed for a ruling upon the motion but he refused to rule. Under the circumstances the refusal to rule must be deemed a denial of the motion. The question was preserved by motion for new trial and was considered and passed upon by the Appellate Court.

REASON FOR GRANTING THE WRIT

1. That portion of the Appellate Court's opinion which holds that the petitioner waived the question of the sufficiency of the evidence because his counsel requested a directed verdict of guilty as to voluntary manslaughter flies in the face of all the authorities that hold that an attorney cannot enter a plea of guilty on behalf of his client and that in order for a court to accept a plea of guilty there must be a knowing waiver by a criminal defendant of his rights both to trial by court, trial by jury and an understanding by him of the consequences of his plea. The conduct of the lawyer in moving the trial court to find the defendant guilty of the crime of voluntary manslaughter was tantamount to the entry of a plea of guilty as to that crime. Even though the trial court denied the motion it had its evil effect by virtue of its treatment by the Appellate Court. Incredible as it may seem, the Appellate Court, in effect, permitted petitioner's trial counsel to enter a plea of guilty as to the crime of voluntary manslaughter.

The consideration accorded the attorney's motion for a directed verdict finding the defendant guilty of voluntary manslaughter, ignored a long history of cases in this Court concerning the due process requirements of waivers of rights. The cases are summed up in the language of this Court in *McCarthy* v. *United States*, 394 U.S. 459, 466 wherein it was said:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquish-

ment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

A grave injustice was done to the petitioner by the Appellate Court of Illinois. Its judgment ought to be vacated and the court directed to consider the questions presented by the petitioner as not having been waived by trial counsel.

2. The request of petitioner for information concerning the whereabouts of Officer Betz was for the obvious purpose of enabling the defendant to interview Betz to determine whether the witnesses for the prosecution made prior inconsistent statements. It goes without saying that a prior inconsistent statement is a primary source of impeaching evidence and the right of an accused to confront the witnesses guaranteed an accused by the Sixth Amendment carries with it the right to cross examine and impeach the witnesses against him. By refusing to make known the whereabouts of Officer Betz, the defendant was denied a possible source of impeaching material with which to conduct an effective cross-examination and therefore was denied his Sixth Amendment right of confrontation. See and cf. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065; *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748; *People* v. *Cagle*, 41 Ill. 2d 528, 244 N.E.2d 200.

The proposed *Standards Relating To Discovery and Procedure Before Trial* of the American Bar Association

Project On Minimum Standards For Criminal Justice require the prosecution to, "Disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged that would tend to reduce his punishment therefor." (*Standard* 2.1 (c)) The prosecution is also required, "Upon defense counsel's request and designation of material for information which would be discoverable within the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, [to] use diligent, good faith efforts to cause such material to be made available to defense counsel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel." (*Standard* 2.4)

The *Standards* above cited and the position adopted here by the appellant are nothing more than a proper application of the rule announced by the Supreme Court of the United States in *Brady* v. *Maryland*, 373 U.S. 83, 104, 83 S.Ct. 1194, 1196-1197, "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

It was not enough for the petitioner to be given Betz' report, for the report could easily have been a summarization of statements of the witness. Only by personally interviewing Betz could petitioner have determined the full scope and context of any oral statements made to the police by the State's witnesses.

For these reasons, the trial court should have compelled the prosecution to disclose to the defendant the whereabouts of Officer Betz and in the event that Officer Betz would have refused to divulge any information to the defendant, to require him to submit to interrogation by the defendant.

CONCLUSION

For the foregoing reason, the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLES A. BELLOWS,
Attorney for Petitioner

ROBERT E. CHERRY
JASON E. BELLOWS
RONALD N. HEFTMAN
On the Brief

APPENDIX

APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Justice Goldberg delivered the Opinion of the Court:

David Brian Roper, defendant, was indicted for the murder of Frank Sowa, III. At that time, defendant was approximately 19 years old. After a jury trial, defendant was found not guilty of murder and guilty of voluntary manslaughter. He was sentenced to the penitentiary for 5 to 20 years.

Defendant was invited to a party given by a young lady at her home about a block from where he lived in Glenview, Illinois. On that date, June 22, 1968, defendant was a private in the United States Army. He had been accepted for study at the United States Military Academy at West Point and was to report there on July 1st.

Whatever the reason for this social gathering, there were ample supplies of beer and whiskey for all present. During the evening, defendant drank three or four drinks described as a mixture of beer and whiskey, while the deceased drank one can of beer. There were about twelve young men and women at the party. The hostess had known the deceased for about one and a half years and she had also gone out with defendant once or twice. At the party, she introduced defendant to the deceased. They had not previously been acquainted.

At one point in the evening, defendant was playing pool in a basement recreation room with another guest named Bruce Drennan. Drennan complained that defendant took too long between shots. Defendant left to go upstairs and returned after eight or ten minutes. He then accused

Drennan of altering the position of the pool balls. There is testimony that Drennan had not actually moved the balls. An argument ensued between Drennan and defendant. There is testimony that defendant suggested that he and Drennan should go "upstairs and have it out."

Defendant, the hostess, Drennan and deceased then went up to the kitchen together. Defendant punched at Drennan. The hostess attempted to intervene but was pushed back by defendant. At this point, the deceased suggested that if defendant wished to pick a fight it should be with him. Accordingly, defendant and the deceased went outside to the front lawn and commenced a fight. The hostess went out, pushed defendant away and told him that he should leave. At the time the hostess intervened, deceased was on the ground and defendant was on top of him. During this fight, Drennan remained in the house. Defendant left to go home.

A few minutes later, the hostess received a telephone call from a neighbor who had seen defendant doing something to automobiles owned by Drennan and deceased and parked outside. Deceased, Drennan and the hostess ran out of the house toward the cars. Defendant jumped up from the right side of one of the cars and began to run. He was pursued by Drennan and the deceased, with the deceased in front. The three of them ran down the block and around the corner.

From this point on, the only witnesses were Drennan and the defendant. Drennan testified that when he and deceased came around the corner, defendant had stopped and was waiting. Neither Drennan nor deceased had anything in their hands. The defendant had a baseball bat in his hand. Deceased was approximately 10 feet ahead of Drennan. He and Drennan slowed down and almost stopped.

Defendant swung the bat and struck the deceased on the left side of his head. Deceased fell to the ground and screamed. Defendant continued to hold the bat and then said to Drennan, "Come on, Bruce, do you want some too?" Drennan turned and ran back toward the house. Defendant started to chase him but then stopped. The deceased ran or staggered back to the house. He was bleeding from his mouth.

The deceased was operated on the following night. He remained in a deep coma after surgery and died, some eight days later, on July 1, 1968. The precise cause of death was cerebral laceration caused by a fracture of the skull.

Defendant testified in his own behalf. As stated in the brief filed by his counsel, his version of the facts has points of difference from the testimony for the People. Defendant testified that when he returned to the pool table during the game with Drennan, he was "pretty sure" that the position of the balls had been changed. He remonstrated with Drennan. Their conversation culminated when defendant said, "Let's go upstairs and have a talk." They went upstairs and an argument ensued. Defendant punched at Drennan but missed. Drennan, however, hit defendant in the face. The hostess and her grandfather then separated them.

The deceased then accosted defendant and said, "any beef you have is with me." Defendant then started for the door and walked out to leave the party. Deceased followed and seized defendant by the arm. Defendant apologized and said that he just wanted to go home. Deceased kept pushing and shoving defendant until a fight commenced on the lawn. Defendants shirt was ripped and both of them fell

to the ground. At that time, they were half on the grass and half on a concrete parkway. When deceased fell, he struck his head on the concrete and his head, "kind of bounced up." Defendant testified that, during this fight, deceased kicked him in the stomach and in the groin. The hostess then came out and the fight stopped.

Defendant further testified that he then went home and changed his clothes. He returned to the vicinity of the cars parked at the party. On the way, he picked up a stick about 3 feet long and 1½ to 2 inches square. Defendant let the air out of the tires on two cars and emptied the contents of the glove compartment of one. In this regard, other evidence shows that the contents of a fire extinguisher had been sprayed into one car and the gas pedal of another had been broken off.

Defendant further testified that then he looked up and saw three men running toward him. He ran down the block, then turned and saw someone coming toward him. Defendant said, "It looked as if I didn't have any place to run so I just turned and with one motion swung at the person behind me." He did not see this person before he swung. He struck this person with his stick and the deceased dropped to his knees. Defendant started walking back toward his home without any conversation with Drennan. Defendant was clear in his testimony that the deceased was moving toward him when he struck out with the stick. The weapon used in the homicide was not produced. The police were unable to recover it despite investigation.

It should be noted that the record contains testimony of six character witnesses. All of them testified that defendant had a good or excellent reputation for truthfulness as well as for being a peaceful and law abiding citizen.

The court gave the jury four forms of verdict. These were guilty and not guilty for the crimes of murder and voluntary manslaughter. The jury found defendant not guilty of murder and guilty of voluntary manslaughter. Defendant makes six contentions regarding trial error and also has argued that the sentence was excessive. Each of these contentions will be considered in order.

Defendant first argues that he was not proved guilty of voluntary manslaughter beyond a reasonable doubt. The gist of this argument is that defendant was not guilty of voluntary manslaughter because there was no "serious provocation" as required by the statute. (C 38, §9-2(a)). As we will note later, the jury was instructed by the trial court with reference to the crimes of murder and voluntary manslaughter. The indictment charged defendant only with murder but it is virtually elementary in Illinois, "that the crime of voluntary manslaughter is embraced by and is a lesser included offense of the charge of murder; and that an accused may be convicted of manslaughter under an indictment for murder." People v. Pratt, 46 Ill. 2d 99, 102 and cases there cited.

Even a brief analysis of the evidence is a cogent demonstration of its sufficiency to justify a verdict of voluntary manslaughter beyond reasonable doubt. According to defendant's own testimony, events during the entire night show that defendant acted under sudden and intense passion resulting from serious and continuous provocation by the deceased. This evidence is that the deceased not only provoked a fight but kicked him despite his apology and although he stated his peaceful intentions and his desire to return home. In addition, the pursuit of defendant by deceased and another young man would constitute an assault which might well be deemed a sufficiently serious

provocation. In this regard, it must be remembered that the existence of provocation is a factual issue. People v. Hurst, 42 Ill 2d 217, 221; People v. Irvin, 115 Ill App 2d 332; People v. Thomas, 93 Ill App 2d 77, 81; People v. Gajda, 87 Ill App 2d 316, 322. Therefore, it was the duty of the jury to determine whether there was or was not sufficient provocation. The verdict is amply supported by competent evidence and by the defendant's own testimony.

Defendant urges that we consider the case at bar "in the light of People v. McMurry, 64 Ill App 2d 248." Unfortunately for this contention, the cases are entirely different. In McMurry, there was no evidence "that the defendant was acting under an intense passion caused by the kind of provocation contemplated by the statute." 64 Ill App 2d at page 251. There, the defendant was either guilty of murder or he was completely innocent. His counsel objected to any instruction given to the jury on manslaughter and objected to submission of a verdict form on manslaughter.

Quite to the contrary, in the case at bar, the defendant tendered an instruction on the issues in the crime of voluntary manslaughter which was given by the court. Defendant's given Instruction No. 18, IPI-Criminal 7.04. State's Instruction No. 15 defining voluntary manslaughter (IPI-Criminal 7.03 and 7.05) was given without objection by defendant. Two verdicts bearing upon voluntary manslaughter were given to the jury without objection by defendant. At the conclusion of the State's case, defendant moved the court to direct a verdict finding defendant not guilty of murder; and, alternatively, to direct a verdict finding defendant guilty of voluntary manslaughter. Defendant cannot try his case before the jury on one theory

and then depart upon a radically new direction with adoption of an inconsistent theory on appeal. Johnson v. United States, 318 US 189, 201; People v. Realmo, 28 Ill 2d 510, 512; People v. Ramos, 112 Ill App 2d 330, 339. Since defendant himself actually invited, procured, participated and acquiesced in the alleged error, he cannot now use it as an attempted vehicle for reversal. People v. Greer, 30 Ill 2d 415, 418; People v. Savage, 102 Ill App. 2d 88, 101; People v. Melero, 99 Ill App 2d 208, 212; People v. Jennings, 84 Ill App 2d 33, 43.

Defendant's second contention is directed to the alleged lack of evidence regarding justifiable use of force. On motion of the State, and over the objection of defendant, the court gave the following instruction (State No. 11):

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> "However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

This instruction is based upon the Criminal Code (C 38, §7-1). See IPI-Criminal 24.06 page 419. Defendant's criticism of this instruction is that it was not supported by the evidence. This claim must be rejected. As shown, it was the theory of the People that defendant, armed with a bat, turned upon his pursuers and struck the deceased. On the contrary, defendant testified that he was in effect cornered by the deceased and his onrushing friend and that he struck out in an attempt to defend himself. Under this evidence, defendant's contention may not stand. The authorities cited by defendant in this regard are inapplicable. They

pertain to situations in which there were no facts whatsoever upon which to base the instructions as given by the court. People v. Organ, 345 Ill 339 and People v. Black, 309 Ill 354.

Furthermore, as pointed out in the State's brief, defendant tendered two instructions which were rejected by the trial court as a proper precaution against duplication. People v. Stringer, 129 Ill App 2d 251, 270. Defendant's refused Instruction No. 23 is word for word identical with the first paragraph of State's Instruction No. 11 as reproduced above. Also, defendant's refused Instruction No. 14 is quite similar in language and in effect to the second paragraph of State's given Instruction No. 11. Since defendant has himself tendered other instructions so similar to the instruction in question, he should not now be heard to object. People v. Riley, 31 Ill 2d 490, 495; People v. Kelley, 105 Ill App 2d 481, 485; People v. Watts, 81 Ill App 2d 283, 286.

Defendant also urges in this aspect of the case that no instruction was given to the jury regarding the issues in the crime of voluntary manslaughter under circumstances constituting unreasonable self-defense. Defendant's Instruction No. 21 (based upon IPI-Criminal No. 7.06) on this subject was refused by the court. The court did instruct the jury at defendant's request as to the issues of voluntary manslaughter under circumstances involving provocation. Defendant's given Instruction No. 18, IPI-Criminal 7.04. This point might have significance if defendant had been convicted of murder. However, since the jury returned a verdict of guilty of voluntary manslaughter, the omission of defendant's tendered instruction was patently harmless. Also, as above pointed out, defendant objected to State's given Instruction No. 11 (IPI-

Criminal 24.06) on justifiable force. This places defendant in an inconsistent posture. Furthermore, this defendant's refused Instruction No. 21 did not follow IPI-Criminal No. 7.06 but modified it by adding a requirement that to sustain the charge of voluntary manslaughter the State was obliged to prove "that the defendant did not act under compulsion." Thus, the tendered instruction was manifestly erroneous and it was properly refused.

The third point raised by defendant is that the court erred in instructing the jury as to the crime of voluntary manslaughter when there was no evidence in that regard. This contention is a repetition of the argument previously advanced. It has already been adequately considered and rejected. Upon examining the instructions in the light of all of the evidence, we conclude that the jury was properly instructed and we find no error.

Defendant's next contention raises a totally different question. Bruce Drennan, who participated with deceased in pursuit of defendant, was called as a witness by the People. An officer named Heinz Betz had interviewed Drennan and made a written report. This document was made available to defense counsel. The defense was desirous of interviewing the officer and requested his home address. Apparently, at the time of trial, the officer was excused from duty on some type of sick leave.

The fact that the defense had obtained a copy of the officer's written report serves completely to differentiate the authorities cited by defendant. In People v. Cole, 30 Ill 2d 375 and in People v. Moses, 11 Ill 2d 84, the court denied defendant access to the statements. In People v. Cagle, 41 Ill 2d 528, the defendant had obtained the statement but the court refused to permit him to use it for impeachment.

In the case at bar, the record shows that counsel for defendant had in fact obtained the home address of the officer and had sent a process server to his home. Also, the State offered to stipulate to use of the written report of the witness for purposes of impeachment. We find accordingly that defendant's request for the address of the officer was superfluous and that the tendered stipulation was adequate to protect and preserve defendant's right to cross-examination to the fullest extent.

The defendant next urges that the trial court erred in improperly limiting defendant's voir dire examination of prospective jurors. The court directed defendant's counsel to desist from further questions regarding the status of the defendant as a candidate to attend the Military Academy at West Point. The trial court did this on the theory that this line of questioning would be premature because defendant had not actually been admitted to West Point at the time of the occurrence.

The record does not show the precise questions put by counsel for defendant which were found objectionable by the court. The record does show that the court also stated that trial counsel should desist from making statements of fact to prospective jurors in the guise of questions but that the court would permit proper questions to be asked.

Conduct of the voir dire examination must and does rest within the discretion of the trial court. People v. Lexow, 23 Ill 2d 541, 543; People v. Lobb, 17 Ill 2d 287, 300; Jines v. Greyhound Corp., 46 Ill App 2d 364, 376. However, in the case at bar, we find nothing to indicate an abuse of discretion by the trial court. There is no showing that defendant was prejudiced in any manner during selection of the jury. The record does not indicate how many pre-

emptory challenges were used by defendant during the course of selecting the jury. There is no evidence of any kind to indicate any bias or prejudice by any individual juror or by the jurors collectively. On the contrary, the very fact that the jury found defendant not guilty of murder and guilty of voluntary manslaughter would tend to negative the existence of any prejudice by the jury.

When defendant was first introduced to deceased upon entering the party, he said to deceased, "I hate you." This was shown by the People in an apparent attempt to prove malice. In his own testimony, defendant verified the fact that he used this language. Defendant was then asked directly by his counsel if he hated the deceased. The defendant responded negatively but the court sustained a prompt objection by the State; and, on motion of the State, struck the answer and directed the jury to disregard it. Defendant claims that this ruling impinged upon his right to rebut the evidence of the prosecution.

Apparently defendant wished to prove, by his own testimony, that he used the phrase "I hate you" in a bantering manner. This would seem reasonable in view of the fact that the defendant had never previously met deceased. However, no additional question along these lines was put to the defendant and his counsel did not at any time make such an offer of proof. People v. Hoffie, 354 Ill 123, 140; People v. Nelson, 89 Ill App 2d 84, 90 and People v. Caldwell, 62 Ill App 2d 279, 285. In addition, it is plain that this ruling by the trial court did not prejudice the defendant in any manner as evidenced by the fact that the jury expressly found defendant not guilty of murder. Defendant actually accomplished the purpose of the stricken testimony. In the opinion of this court, the evidence of guilt was ample beyond a reasonable doubt and the trial was fairly conducted so that defendant was properly found guilty of the crime of voluntary manslaughter.

We now consider defendant's contention that the sentence is excessive. Defendant was sentenced to the Illinois State Penitentiary with the minimum fixed at 5 years and the maximum at 20 years. Defendant has presented us with a lengthy and appealing argument on penology, citing learned Reports and Standards. Defendant also presents statements made in a work by a well known psychiatrist and a report concerning the prison system of Illinois (Menninger's "The Crime of Punishment" and Survey Report on Adult Correctional Facilities and Programs in Illinois, rendered by the John Howard Association). However, our authority in this regard is limited. This court may not, in effect, exercise the function of the trial court and proceed to render a new sentence based upon other or additional evidence or unsupported arguments in mitigation. The rules of the Supreme Court permit this court to "reduce the punishment imposed by the trial court" (43 Ill 2d Rule 615(b) (4)). Under no stretch of the imagination does this rule empower us simply to substitute our judgment for that of the trial judge because criticisms of the present penal system are offered, however eloquent and compelling these arguments may be.

In a number of cases, the Supreme Court and this court have held that before a reviewing court should interfere with the sentence it must be manifest from the record that the term imposed is excessive and not justified by any reasonable view which might be taken of the record. We may exercise this power to reduce the sentence only with considerable caution in a proper case where the penalty constitutes a great departure from the spirit and purpose of fundamental law. People v. Eubank, 46 Ill 2d 383, 394; People v. Taylor, 33 Ill 2d 417, 424; People v. Turner, 129

Ill App 2d 24; People v. Cecil, 128 Ill App 2d 86; People v. Holmes, 127 Ill App 2d 209 and People v. Glasgow, 126 Ill App 2d 82, 90.

With these binding precepts in mind, we must consider that this defendant is a young man without any previous criminal involvement of any kind whatsoever. He was 19 years of age at the time of the occurrence. A number of witnesses testified to his excellent reputation for truth and veracity and for being peaceful and law abiding. The crime for which he was convicted is made probationable by the legislature. We are also keenly aware of the stark and pointless tragedy inflicted upon deceased and his family by the rash and totally unprincipled conduct of defendant. We must consider that a goodly portion of the responsibility, and even of the culpability, must devolve upon thoughtless parents who recklessly permit indiscriminate and unsupervised drinking in their homes by young people who cannot be fully aware of the fatal results which inevitably result from the narcotic effects of alcohol.

With these diverse factors in mind, we must also reflect upon the principles set forth in People v. Lillie, 79 Ill App 2d 174. The court there considered separately the minimum and maximum terms imposed and pointed out the basic purposes sought to be achieved by the imposition of sentence. We agree with the reasoning there established that "adequacy of punishment should determine the minimum sentence, with the maximum dependent upon the court's divination as to the length of time required to achieve rehabilitation." 79 Ill App 2d at page 178. See also people v. Livingston, 117 Ill App 2d 189, 193; People v. Dotson, 111 Ill App 2d 306, 311; People v. Marshall, 96 Ill App 2d 124, 129 and People v. White, 93 Ill App 2d 283, 288.

In our opinion, a sentence of 2 years would constitute an adequate minimum punishment in this case. The minimum sentence of 5 years imposed by the trial court appears to us as not justified by any reasonable view of the facts and circumstances here. Concerning the maximum, in view of all of the factors here present, with great reliance upon the youth of defendant and his prior good conduct, we have reached the conclusion that the maximum of the sentence should be 10 years. This will provide a proper and effective incentive for early rehabilitation and discharge. People v. Thomas, 127 Ill App 2d 444, 456.

Accordingly the judgment of conviction for voluntary manslaughter is affirmed. The sentence is reduced from a term of from 5 to 20 years to a minimum sentence of 2 years and a maximum of 10 years.

JUDGMENT MODIFIED.

Burke, P.J. and Lyons, J. concur.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

Present The Honorable JOSEPH BURKE,
Presiding Judge.

Present The Honorable JOHN J. LYONS, *Judge.*

Present The Honorable MAYER GOLDBERG, *Judge.*

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee

No. 54151 vs.

DAVID BRIAN ROPER,
Appellant

Appeal from the Circuit Court of Cook County

(No. 68 - 2620)

AFFIRMING ORDER

The judgments of the Circuit Court of Cook County are AFFIRMED.

March 22, 1971

APPENDIX C

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable JOSEPH BURKE
Presiding Judge.

Present The Honorable JOHN J. LYONS, *Judge*

Present The Honorable MAYER GOLDBERG, *Judge.*

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee

No. 54151 vs.

DAVID BRIAN ROPER,
Appellant

Appeal from the Circuit Court of Cook County
(No. 68 - 2620)

Petition of Appellant for Rehearing is *Denied.*

July 12, 1971

APPENDIX D

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.*

PRESENT: ROBERT C. UNDERWOOD, *Chief Justice*

JUSTICE WALTER V. SCHAEFER

JUSTICE DANIEL P. WARD

JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE CHARLES H. DAVIS

JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, *Attorney General*

ROBERT G. MILEY, *Marshal*

ATTEST: JUSTIN TAFT, *Clerk*

BE IT REMEMBERED, *that, to-wit: on the* 29th *day of* September, 1971, *the same being one of the days of the*

term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

PEOPLE STATE OF ILLINOIS,

Respondent

No. 44593 vs.

DAVID BRIAN ROPER,

Petitioner

Petition for Leave to Appeal from Appellate Court

First District 54151

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.